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No. 94-1871

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EXXON CORPORATION,
Petitioner,
v.
JOHN RICHARD LUDBROOKE YOUELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is it proper for a federal court to conclude that federal maritime law provides the rule of decision in a commercial marine insurance coverage dispute when the court finds (a) that "fortuity" is an established rule of federal maritime law which federal courts in admiralty have applied in marine insurance cases for over one hundred years and (b) that there is a need for a federal court to determine whether maritime losses caused by an insured's recklessness are fortuitous?

2. Is it proper for a federal court to dismiss a marine insurer's declaratory suit in deference to the insured's parallel state court action when federal maritime law provides the rule of decision?

LIST OF PARTIES

The parties in this action are as identified by Petitioner Exxon Corporation ("Exxon") in its petition for a writ of certiorari.

Pursuant to Rule 29.1 of the Rules of this Court, a list identifying all parent companies and non-wholly owned subsidiaries of Respondents John Richard Ludbrooke Youell, et al. ("Underwriters"), is found in the attached Appendix.

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BRIEF IN OPPOSITION

Underwriters respectfully request this Court to deny Exxon's petition for a writ of certiorari to review the judgment and opinion entered by the Second Circuit in this case.

STATEMENT OF THE CASE

In its petition, consistent with its continuing quest to avoid or delay the exercise of federal court jurisdiction, Exxon has repeatedly mischaracterized the circumstances surrounding its claim, the procedural background of the parties' litigation, and the legal authority which is applicable to this case.

This is a quintessential commercial maritime case arising from the stranding of the supertanker *Exxon Valdez* off Alaska. The dispute is over whether Exxon's marine pollution losses are covered under a global marine insurance contract. It involves sophisticated parties—Exxon is

a multi-national corporate giant with an extensive fleet of ships and oil rigs and with world-wide operations, insured by insurance companies and underwriting syndicates located all over the world. It is governed by federal maritime law. It is a case which the Second Circuit rightly concluded should proceed in a New York federal district court in admiralty—where Underwriters instituted the declaratory judgment action presently at issue before this Court.

This is not a case, as Exxon hopes it will be perceived, raising only garden variety state law insurance issues of interest only to Texas—where Exxon commenced its state court action—and requiring dismisal of Underwriters' federal declaratory suit and adjudication only by a Texas state court. Nor is it a case presenting issues warranting this Court's review.

A. Background Facts

1. The Stranding of the *Exxon Valdez*

On March 24, 1989, *Exxon Valdez* ran aground on Bligh Reef, a well-known and well-marked rock shoal located in Prince William Sound well outside the boundaries of the charted traffic lanes leading into and out of the port of Valdez, Alaska. The stranding ruptured the vessel's cargo tanks, spilling more than 10.8 million gallons of crude oil into the sea.

The *Exxon Valdez* was commanded by Joseph J. Hazelwood, a known, uncontrolled alcoholic. Captain Hazelwood had been drinking during the hours immediately preceding the incident.

After the grounding, a federal grand jury returned criminal indictments against Exxon. All criminal charges required Exxon's knowledge of the circumstances relating to the stranding and resulting pollution; some required evidence of Exxon's intentional misconduct. In September 1991, Exxon pled guilty to certain crimes and settled

all criminal and civil claims brought by the federal government and Alaska, agreeing to pay damages, fines and penalties.

In addition, in a federal lawsuit in Alaska brought against Exxon by commercial fishermen, property owners and others, a jury found that Exxon's misconduct relating to the operation of the *Exxon Valdez* was "reckless" and that such "recklessness" caused the stranding. The jury assessed Exxon $287 million in compensatory damages, and found Exxon's "recklessness" so "reprehensible" that it ordered Exxon to pay $5 billion in punitive damages.[1]

2. Exxon's Claim for Coverage

Exxon has demanded insurance coverage from Underwriters for pollution costs, expenses and liabilities allegedly resulting from the stranding of the *Valdez*.

Exxon's claim is made under certain custom manuscript Global Corporate Excess insurance agreements ("GCE Agreement") negotiated and drafted by Exxon and its New York and London insurance brokers. The GCE Agreement insured specific risks relating to Exxon's worldwide operations for a twelve-month period commencing November 1, 1988, and was subscribed to individually and severally by Underwriters (certain underwriters at Lloyd's, London and more than 100 other

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[1] Although Exxon has persisted throughout the parties' litigation in terming the grounding of the *Valdez* "accidental" (*see, e.g.*, Pet. at p. 2), the jury was charged it could find Exxon "reckless" only if it determined that Exxon acted with subjectively conscious disregard of grave danger or risk of harm. (*In re Exxon Valdez*, C.A. 89-095 (D. Alaska June 13, 1994)). The jury was further charged it could assess punitive damages against Exxon only if it found Exxon's misconduct to be "reprehensible." *Id.* (D. Alaska September 16, 1994).

London market and international insurance companies headquartered all around the globe).[2]

The GCE Agreement was negotiated in New York and London. At the time the Agreement was entered into, Exxon was headquartered in New York. Exxon paid its premiums in New York. In the event of suit, Underwriters agreed to submit to jurisdiction in New York. Underwriters also agreed to accept service of process in New York and designated service agents in New York, including the New York State Insurance Commissioner. New York was designated as the site for any arbitration between the parties.

Underwriters denied coverage of Exxon's claim under the GCE Agreement for a number of reasons, including Exxon's misconduct in causing the grounding of the *Valdez* and the pollution. Thereafter, the parties engaged in a number of non-binding alternative dispute resolution proceedings. To facilitate the continuation of good faith discussions concerning Exxon's coverage claim, Underwriters and Exxon agreed in August 1992 that neither would institute legal proceedings without prior notification to the other. Underwriters and Exxon also executed a tolling agreement to suspend the running of the limitations period governing Exxon's claim during the parties' discussions.

B. The Texas and New York Actions

1. Exxon's Texas Suit

In the midst of the parties' ongoing negotiations, and notwithstanding the clear indication that any unresolved dispute was to be resolved in New York, Exxon—without notice or warning—filed suit on August 4, 1993 in Texas state court, located in Harris County, Houston.

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[2] Exxon seeks coverage under Sections I, IIIA and IIIB of the Agreement. Section I addresses Exxon's first-party property loss or damage. Section IIIA applies to Exxon's marine liabilities: Section IIIB deals with other third-party liabilities.

Exxon's suit in Houston advanced its coverage claim under Sections I, IIIA and IIIB of the GCE Agreement, thereby rejecting arbitration.[3] Exxon's complaint charged breach of contract, breach of the covenant of good faith and fair dealing, and violations of the Texas Insurance Code.

The Houston forum chosen by Exxon for its action has no connection to this matter. Further, there is no reference to Texas in the 128 pages of the GCE Agreement. Other than the fact that Exxon moved from New York to Irving, Texas (near Dallas, not Houston) *after* the GCE Agreement was signed and *after* the stranding of the *Exxon Valdez*, there is no tie between this dispute and Texas.

In order to avoid federal jurisdiction, Exxon stated in its complaint that it was not suing one of its insurers entitled to a federal court forum as an instrumentality of a foreign sovereign.[4] Exxon also announced in its complaint that it would "release and waive" any claim it might have against any other agency or instrumentality of a foreign state.

Exxon twice vigorously resisted removal to federal court. Exxon foiled the first removal, effected pursuant to the express authority of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards,[5]

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[3] Sections I and IIIA of the GCE Agreement provide for arbitration in New York upon the consent of both parties; Section IIIB provides for mandatory arbitration in New York upon request of either party. Although Exxon repudiated aribtration by commencing suit in Houston, Underwriters requested arbitration under the mandatory arbitration clause of Section IIIB. As a result, Exxon's claim under Section IIIB is presently being arbitrated in New York.

[4] Exxon released Qatar General Insurance and Reinsurance Company ("Qatar"), which could have availed itself of federal court jurisdiction pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602, *et seq.*

[5] 9 U.S.C. § 201, *et seq.* *See* 9 U.S.C. § 205.

by "agreeing"—after the case was removed—to arbitrate Section IIIB in New York and taking steps to sever and stay its Texas state court claim under Section IIIB pending the outcome of the New York arbitration. Exxon also frustrated the second removal, effected by Norske Triton Insurance Company, Ltd. ("Star"), a foreign sovereign. Although Exxon fought this removal on a number of different grounds, Exxon ultimately achieved a remand only after again declaring its willingness to release any foreign sovereign and to dismiss its claim against Star in order to return to Houston state court.

2. *New York Proceedings*

After Exxon commenced its Texas action, Underwriters filed a complaint against Exxon in the Southern District of New York on August 30, 1993. The complaint seeks a declaration that there is no coverage for Exxon's claim.

Exxon moved to dismiss or stay Underwriters' declaratory suit, contending that the District Court lacked jurisdiction, or, alternatively, seeking a dismissal or stay of the federal proceedings in deference to its Texas action.

C. *The District Court's Abstention Decision*

The District Court properly recognized that it had subject matter jurisdiction over Underwriters' declaratory suit, determining that "insofar as this case involves marine insurance, it falls within the admiralty jurisdiction." (Pet. App. B, p. B-3).[6] The District Court therefore treated Exxon's motion as one seeking abstention in favor of its Texas action. Professing to follow the abstention analysis established by this Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), and *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), the District Court

[6] So intent was Exxon on avoiding federal jurisdiction that it resisted even this unassailable conclusion. On appeal to the Second Circuit, Exxon finally conceded this is an admiralty case.

decided abstention was justified, and dismissed Underwriters' complaint.

The District Court rested its decision to dismiss the complaint upon the third factor under the *Colorado River* abstention test—avoidance of piecemeal litigation—terming that factor "by far the most significant." (*Id.* at p. B-14). The District Court also found that the fifth *Colorado River* factor—the source of the rule of decision—was marked by "a strong state interest in insurance regulation and an absence of significant federal issues" and hence "points moderately towards abstention." (*Id.*) The fourth factor—the order in which jurisdiction was obtained—slightly favored abstention, according to the District Court,[7] with the remaining factors "contribut[ing] nothing to the mix." (*Id.*).

D. The Second Circuit's Reversal

The Second Circuit reversed, finding that the District Court had abused its discretion in dismissing Underwriters' complaint. (Pet. App. A, pp. A-8 n.2, A-18).

Unlike the District Court, the Second Circuit recognized the importance of federal maritime law, agreeing with Underwriters that federal admiralty law provides the rule of decision governing this case.

Specifically, the Second Circuit rejected Exxon's argument that the "fortuity rule" arises under state law. Citing to this Court's decision in *Orient Mutual Ins. Co. v. Adams*, 123 U.S. 67 (1887), and a host of decisions thereafter from numerous Courts of Appeals, the Second

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[7] In this regard, the District Court cited to the "significance" of what was then a March 27, 1995 trial date in the Texas action. (*Id.* at p. B-6). Exxon requested and was granted such a trial listing after oral argument had been scheduled by the District Court on Exxon's motion to dismiss or stay. After the District Court granted its motion, Exxon agreed it would not seek a trial setting until late 1995 or early 1996. Trial is presently scheduled in Texas for January 16, 1996.

Circuit determined that "the fortuity rule is indeed a creature of federal law. Federal courts sitting in admiralty have been applying some variation of the fortuity rule in marine insurance cases for over a hundred years." (*Id.* at p. A-10).

The Second Circuit found "[l]ess clear . . . how the fortuity rule regards losses caused by the insured's own recklessness." (*Id.*) (While negligent losses are fortuitous, and wilful ones are not, admiralty courts have yet to assign losses caused by the insured's own reckless conduct to either camp."). This "precise issue"—namely, the scope of the "fortuity rule" in marine insurance cases and "whether a marine insurer is liable under a policy for losses caused by an insured's recklessness"—was determined to be an issue of "first impression" (*id.* at pp. A-12, A-13), which, as a matter of federal admiralty law, a federal court should resolve. (*Id.* at p. A-13). Because "a major determinant of the Underwriters' liability to Exxon will be whether maritime losses caused by an insured's recklessness are fortuitous" (*id.* at p. A-18), the Second Circuit concluded that a federal court must retain jurisdiction and decide the case. (*Id.*).

The "most prominent" factor for the Second Circuit was the source of the rule of decision, "because an unresolved question of federal admiralty law will profoundly affect whether the Underwriters are liable to Exxon." (*Id.* at p. A-8). With respect to the issue of piecemeal litigation—which the District Court believed justified its decision to dismiss—the Second Circuit analyzed the risk of inconsistent adjudications by the federal and state courts as being "largely dissipated" by the doctrine of res judicata. (*Id.* at pp. A-13, A-14). The nominal difference in the parties involved in the Texas and New York actions was "of little practical significance" (*id.* at p. A-14), and rendered the risk of inconsistent judgments "inconsequential." (*Id.* at p. A-16).[8]

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[8] Two insurers (Qatar and Star) are not parties to the Texas action, having been dismissed by Exxon to avoid federal jurisdic-

When reversing and remanding this case, the Second Circuit observed that "[w]hile we loathe wasting judicial resources, it would be worse to cede federal review of an issue of federal law merely because Exxon won the race to judgment in state court." (*Id.* at p. A-18).

Thereafter, Exxon moved to stay the issuance of the mandate while it sought certiorari from this Court. The Second Circuit denied Exxon's motion and issued its mandate, remanding this case to the District Court for further proceedings. Exxon then petitioned this Court for review.

REASONS FOR DENYING THE WRIT

The writ should be denied because review is sought of an interlocutory ruling that does not begin to present any question of special importance meriting this Court's attention.

Neither issue on which Exxon seeks interlocutory review—whether the Second Circuit adhered to this Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), and whether the Second Circuit erred in reversing the District Court's dismissal of Underwriters' declaratory suit—is of moment. Contrary to Exxon's urgings, no circuit conflict requiring this Court's attention is created by the Second Circuit's ruling that federal maritime law governs the issue whether maritime losses caused by an insured's "recklessness" are fortuitous. The Second Circuit did not ignore *Wilburn Boat*, as Exxon charges, but instead *followed Wilburn Boat*, reaching a result entirely consistent with the way in which other Courts of Appeals have interpreted *Wilburn Boat*.

Exxon has also suggested certiorari may be appropriate in view of the circuit split concerning whether the *Colo-*

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tion. Star is also no longer in the New York case. Four insolvent insurers are defendants in the Texas proceedings but not a part of the New York action.

rado River abstention doctrine or this Court's ruling in *Brillhart v. Excess Inc. Co. of America*, 316 U.S. 491 (1942), governs a district court's obligation to exercise federal jurisdiction over a declaratory suit when there is a parallel state court action. Exxon is wrong. Because this case is governed by federal maritime law, the Second Circuit's reversal was proper under either the *Colorado River* abstention test or *Brillhart*. This conclusion is left unchanged by this Court's ruling in *Wilton v. Seven Falls Co.*, 1995 WL 347333 (U.S. June 12, 1995), a case involving state law issues only.

I. THERE IS NO NEED FOR INTERLOCUTORY REVIEW.

It is well-settled that this Court's certiorari jurisdiction generally is not exercised for purposes of an interlocutory review. *See, e.g., American Construction Co. v. Jacksonville, T. & K. W. R. Co.*, 148 U.S. 372, 384 (1893) ("Clearly . . . this Court should not issue a writ of certiorari to review a decree of the circuit court of appeals from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarassment in the conduct of the cause."), *cited in Virginia Military Institute v. United States*, 113 S. Ct. 2431 (1993) (mem.) (Scalia, J., concurring). *Accord Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The Second Circuit's decision to reverse and remand the District Court's jurisdictional decision is in no sense that rare type of extraordinary ruling requiring this Court's interlocutory review. To the contrary, the "lack of finality" of the Second Circuit's judgment is a factor that "of itself alone furnish[es] sufficient ground for the denial of the application [for certiorari]." *Ibid.*

II. IN A MANNER CONSISTENT WITH OTHER COURTS OF APPEALS, THE SECOND CIRCUIT ADHERED TO *WILBURN BOAT* AND CORRECTLY CONCLUDED THAT FEDERAL MARITIME LAW PROVIDES THE RULE OF DECISION IN A COMMERCIAL MARINE INSURANCE DISPUTE OVER WHETHER MARITIME LOSSES CAUSED BY THE INSURED'S RECKLESSNESS ARE FORTUITOUS.

The bedrock premise upon which Exxon has rested its petition is its contention that *Wilburn Boat* created a "presumption" that marine insurance coverage disputes are governed by state law, not federal law. (*See, e.g.*, Pet. at pp. 7, 8, 10, 11, 17). According to Exxon, it is this "presumption" that the Second Circuit supposedly ignored, thereby "turn[ing] *Wilburn Boat* on its head" (*id.* at p. 8), and representing "the greatest inroad into *Wilburn Boat* in the last 40 years." (*Id.* at p. 16). Exxon has misread *Wilburn Boat* and mischaracterized the Second Circuit's opinion, seeking to create a circuit conflict that actually does not exist.

A. *Wilburn Boat* Did Not Hold That State Law "Presumptively" Governs Marine Insurance Disputes.

Quite simply, there is *no* "presumption" under *Wilburn Boat* that state law governs marine insurance disputes.[9]

Wilburn Boat involved a claim under a marine insurance policy which allowed recovery for a loss by fire, among other perils. The policy covered a small houseboat which was owned by the Wilburn brothers; during the term of the policy, the houseboat was used to transport passengers across a small inland artificial lake between Texas and Oklahoma. During this time the Wilburns also transferred legal title to the houseboat to their wholly owned corporation, Wilburn Boat Company.

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[9] Interestingly, in the underlying Alaska litigation, Exxon strongly advocated the application of federal maritime law rather than state law, in contrast to its position here.

The claim at issue arose when the houseboat was destroyed by fire while moored on the lake. 348 U.S. at 311.

The insurer denied the claim on the basis that both the commercial use of the houseboat and the transfer of legal title breached express warranties under the policy providing that, absent written consent and permission from the insurer, the houseboat was to be used solely for private purposes and could not be sold, transferred or otherwise assigned. In support of their claim, the insureds relied upon Texas law, which prevented the insurer from denying coverage unless the breach contributed to the loss. The insurer relied upon federal admiralty law to contend that any breach of a policy warranty avoided coverage, regardless of whether the breach caused the loss. *Id.* at 311, 312.

In addressing the issue whether the claim was governed by federal maritime law or Texas law, the Court stated:

> Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule. In the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States. As later discussed in more detail, this state regulatory power, exercised with federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.
>
> Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute. But this does not answer the questions presented, since in the absence of controlling Acts of Congress this Court has fashioned a

> large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress. *Consequently the crucial questions in this case narrow down to these: (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?*

Id. at 313-14 (Citations and footnotes omitted) (emphasis added).

The Court determined that there was no judicially established precedent in federal admiralty law that applied to govern the consequences of breaching an express warranty in a marine insurance policy (*id.* at 316), and "decline[d] to undertake the task" of fashioning a controlling federal admiralty rule under the circumstances of the case. *Id.* at 320.

In reaching this result, the Court recognized and cited to the traditional interest of the States in regulating the insurance business. By no means, however, did *Wilburn Boat* hold there is a "presumption" that state law must apply to resolve a marine insurance dispute. To the contrary, under *Wilburn Boat*, a court is required first to consider whether a judicially established federal admiralty rule applies to the dispute and, then, if no such rule exists, to consider whether a controlling federal admiralty rule should be fashioned. If *either* question is answered positively, federal maritime law provides the rule of decision. It is only when there is no existing federal admiralty rule applicable to the dispute and no need to fashion such a rule that state law is properly applied. *Id.* at 314.

B. The Second Circuit's Ruling Does Not Conflict With Other Circuits' Interpretation of *Wilburn Boat*.

Exxon has represented that "[t]he Second Circuit is part of a conflict involving at least six circuits, and its decision demonstrates the lower courts' need for guidance on the proper application of *Wilburn Boat* and the circumstances

in which federal maritime law displaces the *presumptive* application of state law." (Pet. at p. 7) (emphasis added). Based upon its misreading of *Wilburn Boat*, Exxon has manufactured a circuit conflict where none exists.

The Second Circuit was certainly mindful of the teachings of *Wilburn Boat*, and adhered to them:

> . . . [S]ince the lawsuit here concerns a marine insurance policy, it falls within the embrace of federal admiralty law. *See Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 313 (1955).
>
> That admiralty jurisdiction exists does not automatically assure that the applicable law will be federal, however. Unlike other areas of admiralty law, Congress has not chosen to legislate with regard to marine insurance. *See id.* at 313-14. As a result of this lacuna, marine insurance policies are governed by state insurance regulations, unless the federal courts have fashioned an admiralty rule on point, or unless a need for such a federal rule exists. *See id.* at 314; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409 (1953) (where federal law provides a defense in an admiralty suit, it controls over state law); *see also Kossick v. United Fruit Co.*, 365 U.S. 731, 742 (1961) ("The application of state law in [*Wilburn Boat*] was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented."). *We must therefore determine whether the federal courts have fashioned an applicable admiralty rule, and if not, whether one is necessary.*

Pet. App. A at p. A-9 (parallel citations omitted) (emphasis added).

Exxon asserts that the Second Circuit's ruling creates "a clear conflict" with the Ninth, Eighth, Eleventh, First and Fifth Circuits. (*Id.* at pp. 11-16). However, examination of the cases Exxon cites from those circuits reveals both that there is no true circuit conflict meriting

this Court's review, and that the Second Circuit interpreted and applied *Wilburn Boat* to this case in a manner achieving the *same* result the other circuits would have reached.

Exxon's cases belie the "presumption" of the application of state law which Exxon claims *Wilburn Boat* requires. Although the precise words used to express the *Wilburn Boat* test may vary somewhat from court to court (and from decision to decision), there is basic harmony among the circuits in deciding whether an issue in a marine insurance case is governed by federal maritime law or state law.

Indeed, the Ninth, Eighth, Eleventh, and First Circuits hold that in the first instance courts are to look to federal maritime law, *not* state law, for the rule of decision in marine insurance cases. *See, e.g., Bohemia, Inc. v. Home Ins. Co.*, 725 F.2d 506, 510 (9th Cir. 1984) (state law governs *only* if there is no applicable federal statute, no judicially fashioned admiralty rule, and no need for uniformity in admiralty practice); *Cargill, Inc. v. Commercial Union Ins. Co.*, 889 F.2d 174, 178 (8th Cir. 1989) (federal admiralty law governs; state law may apply *only* when no established federal admiralty law exists); *Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d 1485, 1489-90 (11th Cir. 1986) (focus should be on federal admiralty law, which will apply if an admiralty principle exists or should be fashioned); *Pace v. Ins. Co. of North America*, 838 F.2d 572, 579 (1st Cir. 1988) (requiring consideration of existing federal admiralty rules and of the need to fashion a controlling admiralty rule before applying state law).

While it is true that the formulation of the *Wilburn Boat* rule is expressed differently in the Fifth Circuit than in the other circuits, even that formulation would result in the application of federal maritime law on the issue whether Exxon's maritime losses were fortuitous. The test employed by the Fifth Circuit requires the application

of federal maritime law if an applicable federal maritime rule "specifically governs the conduct in question and consistently has been invoked to control such conduct." *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 888 (5th Cir.), *cert. denied* 112 S. Ct. 279 (1991). Here, of course, the "fortuity rule" represents entrenched federal maritime law which, as the Second Circuit noted, has been applied by federal courts sitting in admiralty for more than one hundred years (Pet. App. A at p. A-10) and will be a "major determinant of the Underwriters' liability to Exxon." (*Id.* at p. A-18).[10]

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[10] The Fifth Circuit test calls for a balancing of "whether the federal maritime rule constitutes 'entrenched federal precedent'; whether the state has a substantial and legitimate interest in the application of its law; and whether the state's rule is materially different from the federal maritime rule." *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d at 886 (citations omitted).

Anh Thi Kieu is a decision frequently cited by Exxon in this litigation. It involves facts entirely different from those giving rise to this dispute. The decision in *Anh Thi Kieu* not to apply federal maritime law—a conclusion reached "with some hesitation" (*id.* at 889)—involved an obviously unsophisticated consumer—a Vietnamese immigrant who, the court suggested, had difficulty in understanding English and completing the insurance application at issue. *Id.* at 885.

It is anomalous, at best, that Exxon—the world's largest oil company—would seek the same deference accorded to Anh Thi Kieu. Indeed, the Fifth Circuit acknowledged its decision in *Anh Thi Kieu* might well be otherwise "[i]n an appropriate case." *Id.* at 890.

Even under the *Anh Thi Kieu* test, however, Exxon is mistaken when it asserts that in the Fifth Circuit, "it is clear that state law would provide the rule of decision [in this case]." (Pet. at p. 12). Exxon is wrong not only because of the "fortuity rule," but also because even *Anh Thi Kieu* made clear that state law may be applied in marine insurance disputes only if "the local state interest materially exceeds the comparative maritime concerns in the controversy." *Id.* at 887. As previously indicated, the absence of any appreciable tie between this dispute and Texas—much less the Houston forum selected by Exxon—does not begin to justify the application of state law instead of federal maritime law. This

The circuit conflict Exxon seeks to create is illusory. There is no reason for this Court to grant certiorari.

C. The Second Circuit Correctly Followed *Wilburn Boat* When Concluding That the Fortuity Rule Is a Creature of Federal Maritime Law and Requires the Federal Court in This Case to Determine Whether Maritime Losses Caused by an Insured's Recklessness Are Fortuitous.

In following the *Wilburn Boat* choice-of-law analysis, the Second Circuit correctly concluded that the "fortuity rule" is firmly anchored in federal maritime law:

> As an initial matter, we agree with plaintiffs that the fortuity rule is indeed a creature of federal law. Federal courts sitting in admiralty have been applying some variation of the fortuity rule in marine insurance cases for over one hundred years. *See Orient Mut. Ins. Co. v. Adams*, 123 U.S. 67 (1887) [parallel citations omitted]. In so doing, these courts have predominantly looked to federal law as precedent. And to the extent that admiralty courts have looked to other sources, they have relied on British as much as state case law authority. That admiralty courts do not look exclusively to state law on the issue of fortuity indicates to us that the rule must have an independent existence in federal maritime law.

Id. at p. A-10 (citations omitted).[11]

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is especially so given the international and commercial nature of the traditional maritime concerns placed at issue by the sophisticated parties involved in this dispute.

[11] As noted by the Second Circuit, Underwriters raised a number of federal admiralty principles, including "fortuity," as examples of some of the federal maritime rules of decision applicable to the parties' dispute. (*Id.* at p. A-9). Additional examples included the admiralty rule governing "removal of debris," which Exxon distorts in its effort to obtain pollution coverage under the GCE Agreement (*see Antilles S.S.Co. v. Members of American Hull Ins. Syndicate*, 737 F.2d 195, 198 (2d Cir. 1984)); the implied warranty of sea-

The Second Circuit's citations to this Court's decision in *Orient* in 1887, and to decisions from many of the circuits in the years thereafter, leave no question that "fortuity" is a "judicially established" federal admiralty rule in cases involving marine insurance—and has been for more than one hundred years.[12]

In a sophistic effort to create an issue where there is none, Exxon seeks to recast the Second Circuit's rejection of its argument that state law governs the fortuity issue. Exxon does so by erroneously claiming that, under *Wilburn Boat*, it is the *standard* of "fortuity"—not the "fortuity rule"—that must be "judicially established" in

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worthiness knowingly breached by Exxon (*see Aguirre v. Citizens Cas. Co.*, 441 F.2d 141, 145-46 (5th Cir.), *cert. denied*, 404 U.S. 829 (1971)); the duties of utmost good faith and disclosure (*uberrimae fidei*) owed by Exxon and its brokers to Underwriters (*see Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 13 (2d Cir. 1986), *cert. denied*, 480 U.S. 932 (1987)); the principle of "proximate cause" applicable in marine insurance cases (*see Lanasa Fruit S.S. & Importing Co. v. Universal Ins. Co.*, 302 U.S. 556, 562 (1938)); and the admiralty rule governing the "sue and labor" clause of the policy (*see Reliance Ins. Co. v. The Escapade*, 280 F.2d 482, 488-89 n.11 (5th Cir. 1960)). Although the Second Circuit deemed it necessary to examine only the first example of applicable admiralty rules identified by Underwriters—the "fortuity rule"—to decide that this case is governed by federal maritime law, obviously the other indicated federal maritime principles reinforce the correctness of that conclusion.

[12] Such citations squarely rebut Exxon's attempt to argue that the "fortuity rule" is not "judicially established" as a federal maritime rule, but simply "a *general* insurance principle" (Pet. at p. 10 n.6) (emphasis in Pet.), and, as such, a rule that is "presumptively" grounded in state law. Although Exxon has referenced a selection of authorities designed to show that the principle of "fortuity" has application in non-marine insurance policies as well as in marine insurance contracts, Exxon cites no authority contrary to that recited by the Second Circuit, and, at bottom, is left with its empty claim that the Second Circuit ignored this Court's directive in *Wilburn Boat* that state law must "presumptively" govern marine insurance disputes. As demonstrated above, no such directive was issued in *Wilburn Boat*.

federal maritime law before what Exxon mistakenly contends is the "presumption of state law" can be displaced. (Pet. at pp. 10, 11). Then, Exxon states that "the Second Circuit found that the 'fortuity' standard was a question of 'first impression.'" (*Id.* at p. 11). On this basis, Exxon declares that "[b]y holding that new federal law should be created to decide a marine insurance coverage question of 'first impression' rather than applying settled state law—as counselled by *Wilburn Boat*—the Second Circuit has created a clear conflict with other circuits." (*Id.*).

Exxon's argument fails because it tries to change both what *Wilburn Boat* and the Second Circuit actually said, and also how the circuits have interpreted *Wilburn Boat*.

The Second Circuit left no doubt that the "fortuity rule" is an established federal maritime rule. It merely questioned as "[l]ess clear . . . how the fortuity rule regards losses caused by the insured's own recklessness." (*Id.* at p. A-10). It was that "precise issue" and *only* that issue—"whether losses caused by the insured's recklessness are fortuitous"—which the Second Circuit found to be of "first impression." (*Id.* at pp. A-12, A-13).[13]

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[13] Exxon argues at some length that "the Second Circuit's decision misinterprets and directly conflicts with [*Orient's*] unambiguous holding [on whether and how 'recklessness' fits within the 'fortuity rule']." (Pet. at 13 n.10).

Exxon is mistaken in its claim that *Orient* "clarified" this issue and required coverage for losses caused by the insured's "recklessness." (*Id.* at 8 n.4, 13, 14 n.10). *Orient* actually did no such thing. Indeed, the Second Circuit aptly explained its interpretation of *Orient*: "We find that *Orient* is equivocal as to the precise issue of whether a marine insurer is liable under a policy for losses caused by an insured's recklessness. *See* 123 U.S. at 72-73. On one hand, as the Underwriters point out, *Orient* affirmed the district court's jury charge that the insurer is not liable for damages that occur because the master acted 'designedly or recklessly.' *Id.* On the other, as Exxon notes, *Orient* also stated the insurer is liable for all losses except those caused by the master's 'fraud or design.' *Id.* We cannot reconcile these two statements, for, at least, in modern legal parlance, 'recklessness' is different from both fraud and design." (*Id.* at p. A-12).

This inquiry, of course, does not begin to alter the conclusion that the "fortuity rule" itself is a "judicially established" maritime principle applicable to this case under *Wilburn Boat*. Indeed, it is precisely because the "fortuity rule" is a "creature of federal law" (*id.* at p. A-10), that the Second Circuit properly concluded there is a need for a federal court to address the scope of the "fortuity rule" as a matter of federal maritime law.

Nor do the cases cited by Exxon support its assertion that the *standard* of "fortuity" must be "judicially established" under *Wilburn Boat* before federal maritime law may apply. Rather, even those cases reveal that the proper inquiry under *Wilburn Boat* is whether a federal admiralty rule exists or is to be fashioned concerning the issue in the case—here, "whether maritime losses caused by an insured's recklessness are fortuitous." *See, e.g., Steelmet, Inc. v. Caribe Towing Corp.*, 779 F.2d at 1489-90 (federal maritime law applies if an admiralty principle exists or should be fashioned which "covers the matter in issue"); *Bohemia, Inc. v. Home Ins. Co.*, 725 F.2d at 510 (admiralty law controls when there is a "judicially fashioned admiralty rule, or a need for uniformity in admiralty practice").

The fact is that federal courts have repeatedly recognized and applied "fortuity" as a longstanding and established principle of federal maritime law. Under such circumstances, it is clearly appropriate for a federal court to analyze and determine the effect of the "fortuity rule" as a matter of federal maritime law by deciding whether this rule bars coverage under a marine insurance policy for maritime losses caused by an insured's recklessness. Certiorari is hardly merited by Exxon's erroneous assumption that there is no need for continuing federal court involvement.[14]

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[14] Exxon casts a blind eye at the second prong of the *Wilburn Boat* choice-of-law analysis—the need to consider fashioning a controlling federal admiralty rule. Exxon simply assumes there

III. THE SECOND CIRCUIT PROPERLY REVERSED THE DISTRICT COURT'S ABSTENTION DECISION IN A CASE GOVERNED BY FEDERAL MARITIME LAW.

Equally unconvincing is Exxon's suggestion that this Court should review the Second Circuit's reversal of the District Court's abstention decision in order to determine whether the Second Circuit erred in applying the *Colorado River* abstention test to this case rather than

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could not possibly be any need for a federal court to fix the boundaries of the "fortuity rule" by determining whether "recklessness" should be a part of the "fortuity rule" in a commercial marine insurance dispute. To that end, Exxon disingenuously asserts that the Second Circuit made "no determination of any need for a uniform federal rule." (Pet. at p. 7). Yet this is precisely what the Second Circuit did when it determined it was for a federal court to decide, as "an issue of admiralty law" (Pet. App. A at p. A-13), "whether losses caused by the insured's recklessness are fortuitous." (*Id.*).

The importance of the need for a federal court to shape federal admiralty law in circumstances such as these is clear. Indeed, in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961), this Court confirmed its intent in *Wilburn Boat* to require the application of admiralty law in cases where, as here, maritime law issues are present. In addressing what it termed "the interplay of state and maritime law" (*id.* at 733), *Kossick* commented: "The application of state law in that case [*Wilburn Boat*] was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented. A concurring opinion [Frankfurter, J., concurring in *Wilburn Boat*, 348 U.S. at 321] and some commentators have preferred to refer the decision to the absurdity of applying maritime law to a contract of insurance on a houseboat established in the waters of a small artificial lake between Texas and Oklahoma. Needless to say the situation presented here has a more genuinely salty flavor than that." *Id.* at 742 (internal citations omitted).

Because this dispute involves traditional commercial marine insurance concerns and international obligations, it highlights the need for uniformity that is the benchmark of federal maritime law. Obviously mindful of that need, the Second Circuit appropriately directed a federal court in admiralty to determine the impact of the "fortuity rule" upon this case.

the *Brillhart* standard. (Pet. at pp. 18-22). In support of its request, Exxon cites to a split among the circuits, and notes that this issue was placed before this Court in *Wilton v. Seven Falls Co.*, No. 94-562, 1995 WL 347333 (U.S. June 12, 1995). Following the filing of Exxon's petition, this Court rendered its decision in *Wilton*, endorsing the *Brillhart* test and affirming a stay of a federal declaratory suit in deference to a state court action in a case governed exclusively by state law.

Exxon's request for certiorari on this issue misses the mark because the parties' dispute is governed by federal maritime law. In such circumstances, both the circuit split cited by Exxon and this Court's ruling in *Wilton* are inapposite. Indeed, as rightly noted by the Second Circuit, "our case is fundamentally distinct from *Wilton* because . . . federal law supplies a rule of decision. *Wilton*, in contrast, involved state law only." (Pet. App. A at p. A-8 n.2).

Because federal law is integral to the resolution of this case, the District Court's decision to dismiss Underwriters' declaratory suit in deference to Exxon's state court action was erroneous under *either* the *Colorado River* abstention doctrine or *Brillhart*. In fact, as noted by this Court's ruling in *Wilton*, *Brillhart's* caution against federal court involvement in litigation that may be handled by a state court under state law is *not* applicable when federal law provides the rule of decision:

> Ordinarily it would be uneconomical as well as vexatious for a federal court to proceed in a declaratory judgment suit where another suit is pending in a state court presenting the same issues, *not governed by federal law*, between the same parties.

316 U.S. at 495 (emphasis added), *quoted in Wilton*, 1995 WL 347333 at *4 (noting the admonition in *Brillhart* against a federal court's "gratuitous interference" with a state court's disposition of cases involving only state law issues).

Indeed, under the *Brillhart* test, the federal interest in the exercise of federal jurisdiction over cases in admiralty where federal maritime law provides the rule of decision is such that abstention in favor of a state court proceeding is inappropriate. There is no semblance of any split among the circuits that even begins to support certiorari on the issue of a district court's obligation to exercise jurisdiction over a declaratory suit governed by federal law when there is a parallel state court proceeding. This conclusion is unaltered by this Court's decision in *Wilton*:

> We do not attempt at this time to delineate the outer boundaries of [a district court's] discretion in other cases, for example, *cases raising issues of federal law* or cases in which there are no parallel state proceedings. Like the Court of Appeals, we conclude only that the District Court acted within its bounds in staying this action for declaratory relief where parallel proceedings, presenting opportunity for ventilation of the same state law issues, were underway in state court.

Id. at *8 (emphasis added).[15]

Nor is there any merit in Exxon's assertion that "because state courts have concurrent jurisdiction over suits in admiralty pursuant to the 'saving to suitors' clause of 28 U.S.C. § 1333(1), Congress explicitly has determined that such issues should be resolved by the state courts if

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[15] Exxon is wrong when it claims that under the *Brillhart* test the District Court's decision to abstain in this case was justified by the "danger" of piecemeal litigation alone. (Pet. at p. 19). As the Second Circuit properly concluded, because, as a practical matter, the parties and the issues in the parallel proceedings are the same, principles of res judicata render "inconsequential" the risk of inconsistent judgments central to the piecemeal litigation factor. (Pet. App. A at p. A-16). The Second Circuit rightly determined that "the possible annoyance that piecemeal litigation may cause here hardly offsets the commanding presence of a federal question of first impression." (*Id.*).

the plaintiff chooses to bring suit there." (Pet. at p. 20). Exxon has twisted the "saving to suitors" clause beyond recognition.

The "saving to suitors" clause merely recognizes that state courts have jurisdiction in maritime cases, *concurrent with federal courts. See, e.g., Madruga v. Superior Court*, 346 U.S. 556, 561 (1954). The clause does *not* begin to suggest—as Exxon would have this Court believe—that state court jurisdiction should be *exclusive.* Simply because the clause *allows* state courts to have *concurrent* jurisdiction over maritime disputes does *not* mean that it is therefore proper to dismiss a federal declaratory judgment action over which there is admiralty jurisdiction in favor of a state court proceeding. *See Waring v. Clarke*, 46 U.S. (5 How.) 441 (1847). That is especially so here, given the dominant role federal admiralty law has in this dispute.[16]

Because federal law governs this case, the Second Circuit's reversal was entirely proper under any standard. Certiorari is inappropriate on this issue as well.

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[16] Exxon has cited no authority for its erroneous contention that state court jurisdiction should be exclusive. Rather, Exxon's cases simply discuss the fact that, pursuant to the "saving to suitors" clause, state courts have the "*competency*" to *apply* federal maritime law. (Pet. at pp. 20-21). Those cases have no significance here, since the issue before the Second Circuit was not whether the state court was capable of maintaining jurisdiction, but instead whether Underwriters' federal suit was properly dismissed.

CONCLUSION

Exxon's petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 14, 1995

APPENDIX

APPENDIX

The following list identifies all parent companies and non-wholly owned subsidiaries of Respondents:

ABU DHABI NATIONAL INSURANCE COMPANY

Parent: N/A
Non-wholly owned subsidiaries: N/A

ALLIANZ INTERNATIONAL INSURANCE COMPANY LIMITED

Parent: N/A
Non-wholly owned subsidiaries: N/A

AMERICAN HOME ASSURANCE COMPANY

Parent: American International Group, Inc.
Non-wholly owned subsidiaries: N/A

ARENDAL FORSIKINGSSASKAB A/S

Parent: N/A
Non-wholly owned subsidiaries: N/A

ARIG-ARAB INSURANCE GROUP (BSC)

Parent: N/A
Non-wholly owned subsidiaries: N/A

ASSICURARIONI GENERALI S.P.A.

Parent: N/A
Non-wholly owned subsidiaries: N/A

ATLANTIC MUTUAL INSURANCE COMPANY

Parent: Atlantic Mutual Companies
Non-wholly owned subsidiaries: N/A

ATLAS ASSURANCE COMPANY LTD

Parent: Guardian Royal Exchange PLC
Non-wholly owned subsidiaries: N/A

BALTICA FORSIKRING

Parent: N/A
Non-wholly owned subsidiaries: N/A

BISHOPSGATE INSURANCE LIMITED

Parent (Jointly owned by): AMEV/VSB 1990 NV; NV AMEV; GROUP AC
Non-wholly owned subsidiaries: N/A

CAISSE INDUSTRIELLE D'ASSURANCE MUTUELLE LANGUEDOC

Parent: N/A
Non-wholly owned subsidiaries: N/A

CHANDOS INSURANCE COMPANY LIMITED

Parent: BASS PLC
Non-wholly owned subsidiaries: N/A

CIGNA INSURANCE COMPANY OF EUROPE S.A.—N.V.

Parent: CIGNA Corporation
Non-wholly owned subsidiaries: N/A

CHRISTIANA GENERAL INSURANCE CORPORATION OF NEW YORK

Parent: Uni Storebrand A/S
Non-wholly owned subsidiaries: N/A

COLONIA INSURANCE COMPANY (UK) LIMITED

Parent: Colonia Versicherung Atiengesellschaft
Non-wholly owned subsidiaries: N/A

COLONIA INSURANCE COMPANY

Parent: Union des Assurances de Paris (UAP)
Non-wholly owned subsidiaries: N/A

COMMERCIAL UNION ASSURANCE COMPANY PLC

Parent: Commercial Union PLC
Non-wholly owned subsidiaries: N/A

COMPAGNIE de REASSURANCE de L'ILE de FRANCE

Parent: N/A
Non-wholly owned subsidiaries: N/A

CONTINENTAL INSURANCE COMPANY

Parent: The Continental Corporation
Non-wholly owned subsidiaries: N/A

CORNHILL INSURANCE PLC

Parent: N/A
Non-wholly owned subsidiaries: N/A

DAI-TOKYO INSURANCE COMPANY (UK) LIMITED

Parent: The Dai-Tokyo Fire and Marine Insurance Company, Limited
Non-wholly owned subsidiaries: N/A

DOMINION INSURANCE COMPANY LIMITED

Parent: La Fondiaria Assicurazioni, S.P.A.
Non-wholly owned subsidiaries: N/A

EAGLE STAR FRANCE

Parent: N/A
Non-wholly owned subsidiaries: N/A

ENGLSH & SCOTTISH MARITIME & GENERAL INSURANCE COMPANY LIMITED

Parent: FINAXA

Non-wholly owned subsidiaries: N/A

EXCESS INSURANCE COMPANY LIMITED

Parent: ITT Corporation

Non-wholly owned subsidiaries: N/A

FIDELITY & CASUALTY COMPANY OF NY

Parent: The Continental Corp.

Non-wholly owned subsidiaries: N/A

FIREMAN'S FUND INSURANCE COMPANY

Parent: Allianz Versicherungs-AG

Non-wholly owned subsidiaries: Fireman's Fund insurance Co. of Iowa; Fireman's Fund Insurance Co. of Wisconsin; Fireman's Fund Insurance Co. of New Jersey; San Francisco Insurance Co. (U.K.) Ltd.

FIREMAN'S FUND INSURANCE COMPANY OF NEWARK

Parent: The Continental Corporation

Non-wholly owned subsidiaries: N/A

FOLKSAM INTERNATIONAL INSURANCE COMPANY (UK) LIMITED

Parent: Folksam General Mutual Insurance Society of Sweden

Non-wholly owned subsidiaries: N/A

FUJI FIRE & MARINE INSURANCE COMPANY (UK) LIMITED

Parent: The Fuji & Marine Insurance Company Limited

Non-wholly owned subsidiaries: N/A

GJENSIDIGE NORSK SKADEFORSIKRING

Parent: N/A

Non-wholly owned subsidiaries: Nimbus A/S; Saminvest A/S; Nordic Mutual AB

HAFNIA FORSIKRING (NOW KNOWN AS CODAN INSURANCE LIMITED)

Parent: N/A

Non-wholly owned subsidiaries: N/A

HANSA MARINE INSURANCE COMPANY

Parent: Trygg Hansa SPP Group

Non-wholly owned subsidiaries: N/A

HANSA MARINE INSURANCE COMPANY (UK) LIMITED (NOW KNOWN AS HANSA RE & MARINE INSURANCE COMPANY (UK) LIMITED)

Parent: Trygg-Hansa SPP Holding AB

Non-wholly owned subsidiaries: N/A

INDEMNITY MARINE ASSURANCE COMPANY LIMITED

Parent: Commercial Union PLC

Non-wholly owned subsidiaries: N/A

INDUSTRIAL MUTUAL INSURANCE COMPANY (NOW KNOWN AS PATRIA REINSURANCE COMPANY LIMITED)

Parent: N/A

Non-wholly owned subsidiaries: Insurance Co. of Finland Ltd.; Oy Haveri Ab; Patria Insurance Co. Ltd.; Finnish Marine Insurance Co. Ltd.; Finnish Holdings, Ltd.; Otso Loss of Profits Insurance Co.,

Ltd.; Finnish Industrial Security Co.; Nordimex SA; Nordic Union Reinsurance Corp.; Nova Life Insurance Co.; Western Reinsurance Co.; United Reinsurance Co. of Ireland; Arabian Scandinavian Insurance Co., Ltd; La Licorne Cie de Reassurances; Finnisurance (Services) Ltd.

INSURANCE COMPANY OF NORTH AMERICA

Parent: CIGNA Corporation

Non-wholly owned subsidiaries: N/A

INSURANCE COMPANY OF NORTH AMERICA (UK) LIMITED

Parent: CIGNA Corporation

Non-wholly owned subsidiaries: N/A

INTERNATIONAL INSURANCE COMPANY OF HANNOVER LIMITED

Parent: HDI Haftpfhchtverband der Deutchen Industre VaG

Non-wholly owned subsidiaries: N/A

LA CONCORDE COMPAGNIE D'ASSURANCES CONTRE LES RISQUES DE TOURS NATURE

Parent: GENERALI

Non-wholly owned subsidiaries: N/A

LA REUNION FRANCAISE

Parent: N/A

Non-wholly owned subsidiaries: Societe Parisienne de Souscription; Robert Malatier Limited

LA REUNION FRANCAISE SOC. ANON. D'ASSURANCES ET DES REASSURANCES

Parent (The following have at least 1/10 share of Capital):

L'Union Des Assurances De Paris-I.A.R.D.; L'Union Des Assurances De Paris-VIE, La France-I.A.R.D.; La Concorde; Hannover Ruckversicherungs Aktiengeseuschaft; Abeille Assurances; Groupe Sun Alliance et London Assurance

Non-wholly owned subsidiaries: La Reunion Europeenne; La Reunion Aerienne; La Reunion Spatiale; La Societe Parisienne De Souscription

LEADENHALL INSURANCE LTD

Parent: (Jointly owned by): AMVES/VSB 1990 NV; NV AMEV; GROUP AG

Non-wholly owned subsidiaries: N/A

LEGAL & GENERAL ASSURANCE SOCIETY LIMITED (NOW KNOWN AS LEGAL & GENERAL INSURANCE LIMITED)

Parent: Legal & General Group PLC

Non-wholly owned subsidiaries: N/A

LOMBARD CONTINENTAL INSURANCE PLC (NOW KNOWN AS CONTINENTAL MANAGEMENT SERVICES LIMITED)

Parent: The Continental Corporation

Non-wholly owned subsidiaries: N/A

THE LONDON ASSURANCE

Parent: Sun Alliance Group PLC

Non-wholly owned subsidiaries: N/A

LONDON & HULL MARITIME INSURANCE COMPANY LIMITED (NOW KNOWN AS AXA MARINE & AVIATION INSURANCE (UK) LIMITED)

Parent: N/A

Non-wholly owned subsidiaries: N/A

THE MARINE INSURANCE COMPANY LIMITED

Parent: Royal Insurance Holdings PLC
Non-wholly owned subsidiaries: N/A

MINSTER INSURANCE COMPANY LIMITED (NOW KNOWN AS GAN MINSTER INSURANCE COMPANY LIMITED)

Parents GAN Group
Non-wholly owned subsidiaries: N/A

NATIONAL EMPLOYERS MUTUAL

Parent: N/A
Non-wholly owned subsidiaries: NEM Business Services Ltd.; VJ Wright 'Underwriting' Ltd.; Compensation Business Services Pty. Ltd.; NEM Reinsurance Corp. (USA); NEM Insurance Co. Ltd. (Zimbabwe) (Pte); National Employers' General Insurance Co. Ltd. (South Africa); NEM (Jamaica) Ltd.; NEM (Bermuda) Ltd.; NEM Insurance Co. (Nigeria); NEM (West Indies) Insurance Limited; National Underwriters Ltd.; NEM Insurance Ltd.; NEM Assurance des Regions Francaises SA; NEM Insurance (Malaysia) Sdn Bhd

NATIONAL UNION FIRE INSURANCE COMPANY

Parent: American International Group, Inc.
Non-wholly owned subsidiaries: N/A

NAVIGATORS INSURANCE COMPANY

Parent: The Navigators Group, Inc.
Non-wholly owned subsidiaries: N/A

NEW HAMPSHIRE INSURANCE COMPANY

Parent: N/A
Non-wholly owned subsidiaries: N/A

NEW HAMPSHIRE INSURANCE COMPANY

Parent: American International Group, Inc.
Non-wholly owned subsidiaries: N/A

NEW YORK MARINE AND GENERAL INSURANCE COMPANY

Parent: NYMAGIC
Non-wholly owned subsidiaries: N/A

NIPPON FIRE & MARINE INSURANCE COMPANY LIMITED

Parent: Nippon Fire & Marine Insurance Company Ltd. of Tokyo
Non-wholly owned subsidiaries: N/A

NORGES BRANNKASSE MUTUAL INSURANCE COMPANY (UNI) (NOW KNOWN AS UNI-STORE-BRAND)

Parent: UNI Storebrand A/S
Non-wholly owned subsidiaries: N/A

NORSKE TRITON INSURANCE COMPANY LIMITED (NOW KNOWN AS STAR INSURANCE LIMITED)

Parent: N/A
Non-wholly owned subsidiaries: N/A

NORTHERN ASSURANCE COMPANY NO. 6

Parent: Commercial Union PLC
Non-wholly owned subsidiaries: N/A

NORWICH UNION FIRE INSURANCE SOCIETY LIMITED

Parent: N/A
Non-wholly owned subsidiaries: Canada Security Assurance Co.; Ilios Greek Insurance Co. Ltd.; Heritage Insurance Company of Zimbabwe Limited

OCEAN MARINE INSURANCE

Parent: Commercial Union PLC

Non-wholly owned subsidiaries: N/A

OMNIUM INSURANCE & REINSURANCE COMPANY LIMITED

Parent: N/A

Non-wholly owned subsidiaries: N/A

ORION INSURANCE COMPANY P.L.C.

Parent: N/A

Non-wholly owned subsidiaries: Orion Insurance (General) PLC.; Orion Insurance Management Comany Limited

PEARL ASSURANCE PUBLIC LIMITED COMPANY

Parent: Pearl Group PLC

Non-wholly owned subsidiaries: Companhia de Segurda Monarca

PENNSYLVANIA LUMBERMEN'S MUTUAL INSURANCE COMPANY

Parent: N/A

Non-wholly owned subsidiaries: N/A

PHOENIX ASSURANCE PUBLIC LIMITED COMPANY

Parent: Sun Alliance Life Limited

Non-wholly owned subsidiaries: Compania de Sequros La Fenix Peruana

POLARIS ASSURANCE A/S (NOW KNOWN AS UNI STOREBRAND INSURANCE COMPANY (UK) LIMITED)

Parent: Uni Storebrand International Insurance A/S

Non-wholly owned subsidiaries: N/A

POOL TRANSPORT EAGLE STAR L'INDEPENDENCE POOL

Parent: N/A
Non-wholly owned subsidiaries: N/A

PRESERVATRICE FONCIERE T.I.A.R.D. COMPAGNIE D'ASSURANCES

Company dissolved in 1988.

PROGRESSIVE CASUALTY INSURANCE COMPANY

Parent: The Progressive Corporation
Non-wholly owned subsidiaries: N/A

THE PRUDENTIAL ASSURANCE COMPANY LIMITED

Parent: N/A
Non-wholly owned subsidiaries: Edger Investments Ltd.; Prudential Annuities Ltd.; Prudential Leven NV; Prudential Life of Ireland Limited; Prudential Pensions Ltd.; Prudential Vita SPA; The Prudential Assurance Company of Singapore (Private) Ltd.; The Prudential Life Assurance Company of England (Canada); The Standard Trust Ltd.; The Prudential Assurance Company of Kenya Ltd.; St. Helen's Trust Ltd.

QATAR INSURANCE AND REINSURANCE COMPANY

Parent: N/A
Non-wholly owned subsidiaries: N/A

THE REINSURANCE CORPORATION OF NEW YORK

Parent: Piedmont Management Co., Inc.
Non-wholly owned subsidiaries: N/A

REPUBLIC INSURANCE COMPANY

Parent: Winterthur Schweizerische Versicherungs Gesellschaft
Non-wholly owned subsidiaries: N/A

RIUNIONE ADRIATICA di SICURTA

Parent: Allianz Holding A.G.
Non-wholly owned subsidiaries: N/A

SAMVIRKE SKADEFORSIKRING A/S

Parent: Samvirke Group Ltd.
Non-wholly owned subsidiaries: Folksamerica; Folksam UK; ALKA

SCOR (U.K.) REINSURANCE COMPANY LIMITED (NOW KNOWN AS SCOR UK COMPANY LIMITED)

Parent: SCOR S.A.
Non-wholly owned subsidiaries: Finimo UK Ltd.

THE SCOTTISH LION INSURANCE COMPANY LIMITED

Parent: China Merchants Holdings (UK) Ltd.
Non-wholly owned subsidiaries: N/A

SIRIUS INSURANCE COMPANY LIMITED (NOW KNOWN AS LF INSURANCE COMPANY, LIMITED-INDUSTRIAL AND MARINE)

Parent: N/A
Non-wholly owned subsidiaries: N/A

SIRIUS INSURANCE COMPANY (UK) LIMITED

Parent: ABB Asea Brown Boveri Ltd.
Non-wholly owned subsidiaries: N/A

SKANDIA INTERNATIONAL INSURANCE CORPORATION

Parent: Skandia Insurance Company Ltd.
Non-wholly owned subsidiaries: N/A

SKANDIA U.K. INSURANCE P.L.C.

Parent: Skandia Insurance Company Ltd.
Non-wholly owned subsidiaries: N/A

SOCIETE COMMERCIALE de REASSURANCE

Parent: N/A
Non-wholly owned subsidiaries: SCOR Paris; SCOR U.S. Corp.; Ecusor; Multiscor; SCOR Reinsurance (ASIA) Co. Ltd.; SCOR Reinsurance Australia; SCOR Reinsurance Co. of Canada; SCORLUX

SOVEREIGN MARINE AND GENERAL INSURANCE COMPANY LIMITED

Parent: Willie Corroon Group PLC.
Non-wholly owned subsidiaries: N/A

SPHERE DRAKE INSURANCE PLC

Parent: Sphere Drake
Non-wholly owned subsidiaries: N/A

STOREBRAND INSURANCE COMPANY (UK) LIMITED

Parent: UNI Storebrand International Insurance A/S
Non-wholly owned subsidiaries: N/A

STOREBRAND REINSURANCE COMPANY LIMITED

Parent: UNI Storebrand International Insurance A/S
Non-wholly owned subsidiaries: N/A

SUMITOMO MARINE & FIRE INSURANCE COMPANY (EUROPE) LIMITED

Parent: The Sumitomo Marine & Fire Insurance Company Ltd.

Non-wholly owned subsidiaries: SPAC Management (Luxembourg) SA

SWITZERLAND INSURANCE COMPANY (UK) LIMITED (NOW KNOWN AS SR INTERNATIONAL BUSINESS INSURANCE COMPANY LIMITED)

Parent: Swiss Reinsurance Company

Non-wholly owned subsidiaries: N/A

TAISHO MARINE & FIRE INSURANCE COMPANY (UK) LIMITED

Parent: Mitsu Marine & Fire Insurance Co. Ltd.

Non-wholly owned subsidiaries: N/A

TERRA NOVA INSURANCE COMPANY LIMITED

Parents: Aetna Life & Casualty Company; CIGNA Corporation; Marsh & McLennen Companies (Through Guy Carpenter & Co., through C.T. Bowring & Co.); Trycourt Financial Holdings

Non-wholly owned subsidiaries: Ian Morton Underwriting Agency Limited

THE THREADNEEDLE INSURANCE COMPANY LIMITED

Parent: Eagle Star Reinsurance Company Limited

Non-wholly owned subsidiaries: N/A

THE TOKIO MARINE & FIRE INSURANCE COMPANY LIMITED

Parent: N/A

Non-wholly owned subsidiaries: TM Claims Service Inc.; Tokio Marine Management Inc.; Tokio Re Corporation; The Tokio; Trans Pacific Insurance Company; Tokio Marine Realty Co. Ltd.; Tokio Marine Asset Management; America Latina Companhia de Seguros; La Rural del Paraguay SA; Tokio Marine Internacional Sociedad; Tokio Marine de Venezuela, C.A.; Tokio Marine Europe Limited; The Tokio Marine Capital Research Ltd.; Tokio Marine Property Limited; TM Management Services; The Tokio Marine & Fire Insurance Company (UK) Limited; Tokio Reinsurance Company Ltd.; The Tokio Marine Management (Australia) Pty., Ltd.; Pan-Malayan Insurance Corporation; The Sri Muang Insurance Co. Ltd.; Tokio Marine South-East Servicing Company Ltd.; Berjaya General Insurance Sdn Bhd.; The Tokio Marine & Fire Insurance Company (Singapore) PLC.; Tokio Management Services (Asia) PLC. Ltd.; P.T. Asuransi Tokio Marine; Tokio Marine International Fund (Bahama) Company Limited; The Arab-Eastern Insurance Company Limited, E.C.; The Wuphoon Insurance Company Ltd.

THE TOKIO MARINE & FIRE INSURANCE COMPANY (UK) LIMITED

Parent: The Tokio Marine & Fire Insurance Company Ltd.

Non-wholly owned subsidiaries: N/A

TUREGUM INSURANCE COMPANY

Parent: Zurich Versicherungs—GES

Non-wholly owned subsidiaries: N/A

UNITED FIRE & CASUALTY COMPANY

Parent: N/A

Non-wholly owned subsidiaries: N/A

UNITED REINSURANCE CORPORATION OF NEW YORK (NOW KNOWN AS RECOR INSURANCE COMPANY INC.)

Parent: N/A

Non-wholly owned subsidiaries: N/A

VESTA (UK) INSURANCE COMPANY LIMITED

Parent: Forsikringsaktiebolaget Skandia

Non-wholly owned subsidiaries: N/A

WAUSAU INSURANCE COMPANY (UK) LIMITED

Parent: Employers Insurance of Wausau

Non-wholly owned subsidiaries: N/A

THE WORCESTER INSURANCE COMPANY

Parent: Harleysville Group, Inc.

Non-wholly owned subsidiaries: N/A

THE YASUDA FIRE & MARINE INSURANCE COMPANY LIMITED

Parent: N/A

Non-wholly owned subsidiaries: Yasuda Fire & Marine Insurance Co. of America

THE YASUDA FIRE & MARINE INSURANCE COMPANY OF EUROPE LIMITED

Parent: The Yasuda Fire & Marine Insurance Company Ltd.

Non-wholly owned subsidiaries: Marnix Central Insurance Services, Ltd.

THE YORKSHIRE INSURANCE COMPANY LIMITED

Parent: General Accident PLC

Non-wholly owned subsidiaries: N/A